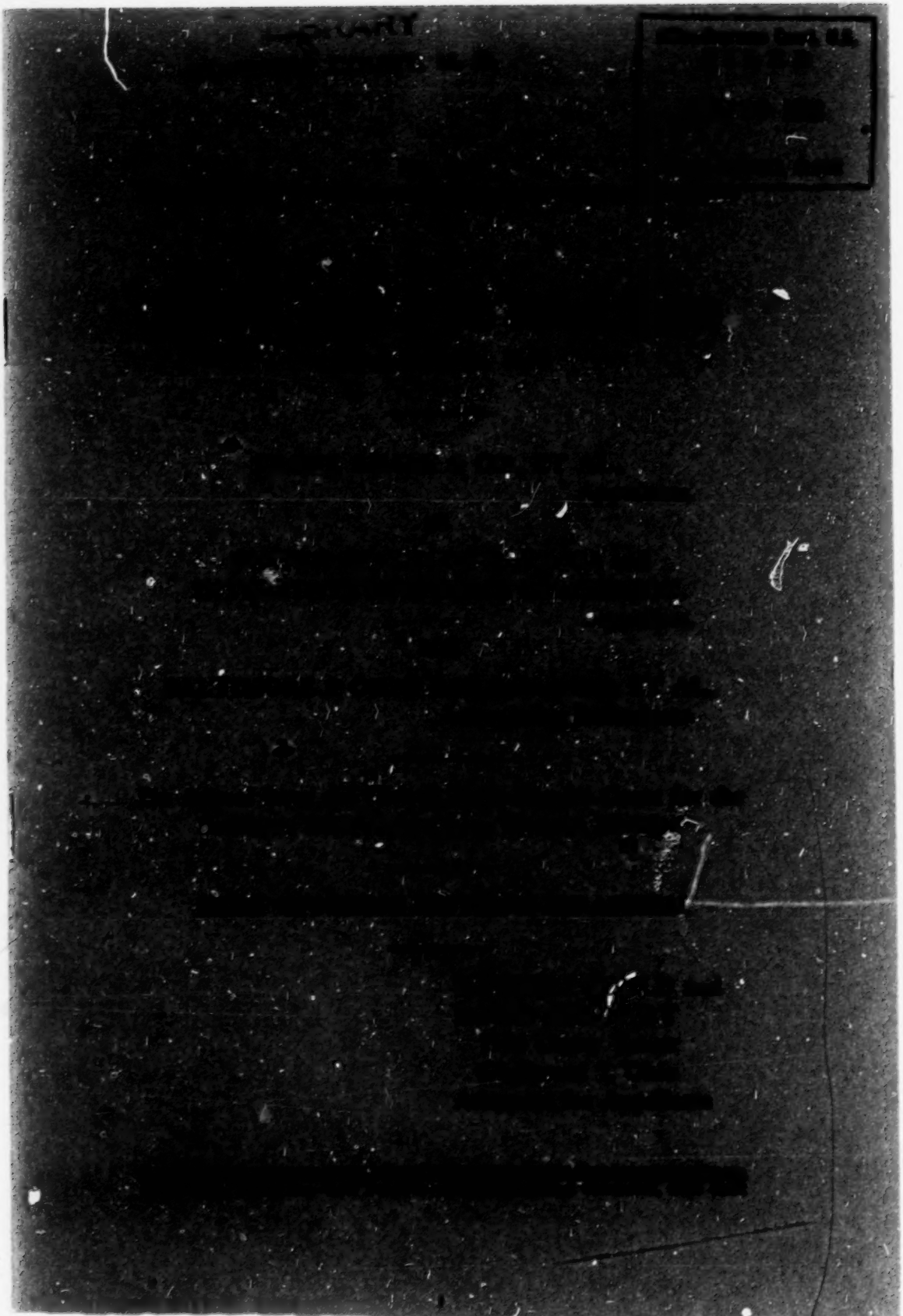

INDEX

	Page
Statement	1
I. Appellees' Motion	2
II. Intervening Defendants' Motion	5
Conclusion	7
Proof of Service	10

CITATIONS

Cases:

Barringer & Co. v. *United States*, 319 U.S. 1	2
Florida v. *United States*, 282 U.S. 194	4
Increased Freight Rates, 1958, 302 I.C.C. 665	3, 5
Interstate Commerce Commission v. *Baird*, 194 U.S. 25	3, 6
Jersey City v. *United States*, 54 F.S. 315	4
Newport News Shipbuilding & Dry Dock Co. v. *Baltimore & Ohio R. Co.*, 160 I.C.C. 620	7
Pacific Inland Tariff Bureau v. *United States*, 134 F.S. 210	4
Pennsylvania Railroad Co., The v. *United States*, 99 F.S. 394	4
Radio Corporation of America v. *United States*, 341 U.S. 412	4
Southern Railway Co. v. *Virginia*, 290 U.S. 190	5
Southern Stevedoring Co. v. *Voris*, 190 F. 2d 275	4
Texas & Pacific Railway Co. v. *United States*, 289 U.S. 627	2
United States v. *Illinois Central Railroad Co.*, 263 U.S. 515	2

Statutes:

Interstate Commerce Act, 49 U.S.C.:	
Section 1	9
Section 3	9

Page

Miscellaneous:

General Rules of Practice of the Interstate Commerce Commission, Rule 1.75 3
Federal Rules of Civil Procedure:
Rule 1 6
Rule 43(b) 6

In the

Supreme Court of the United States

October Term, 1963

No. 506

FRANK ADAMS & CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees,

and

BALTIMORE & OHIO RAILROAD CO., ET AL.,
Intervening Defendants.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division

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BRIEF OPPOSING MOTIONS TO AFFIRM

STATEMENT

Pursuant to Rule 16(3) of the Revised Rules of this Court, appellants file this brief opposing the separate

motions to affirm of the United States of America and the Interstate Commerce Commission, appellees, and the Baltimore & Ohio Railroad Co., et al, intervening defendants.

I. Appellees' Motion

1. Appellees fail to meet the allegations of violations alleged in appellants' complaint by deviating into comparisons of rates on scrap iron and truck compelled "list 2" manufactured iron and steel products (Appellees' Motion p. 6). The crux of appellants' case is that steel producers have switched their purchase of basic raw materials from scrap iron to iron ore and pig iron, principally because the latter commodities are economically preferable by reason of their being transported by the intervening defendant railroads at subnormal freight rates. Neither appellees nor the intervening defendants deny that iron ore moves at rates one-third to one-fourth scrap rates as asserted by appellants (J.S. 14), which accounts for the 69.7 percent increase in iron ore prices, 62.5 percent increase in pig iron prices and 12 percent decrease in scrap prices since 1947-49 (J.S. 18).

With reference to the action of the intervening defendant railroads in reducing manufactured iron and steel rates to meet truck competition, this Court has repeatedly held "that competitive factors . . . are no justification for . . . discrimination,"[1] and that "the purpose of Congress (in enacting the Interstate Commerce Act) was to cut up by the roots every form of discrimination, favoritism and inequity."[2] See also *United States* v. *Illinois Central Railroad Co.*, 263 U.S. 515, 524.

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[1] Justice Douglas dissenting in *Barringer & Co.* v. *United States*, 319 U.S. 1, 18.

[2] Chief Justice Stone dissenting in *Texas & Pacific Railway Co.* v. *United States*, 289 U.S. 627, 658-659, in which Justice Hughes, Brandeis and Cardoza concurred.

By what logic does the 70 percent rule, steadfastly adhered to by the Commission for 34 years in comparing 44,800 pound scrap rates to 40,000 pound manufactured iron and steel rates, become an improper standard when comparing 80,000 pound scrap rates to 80,000 pound manufactured iron and steel rates?

How do appellees rationalize the testimony of the intervening defendant railroads and the findings of the Commission in contemporaneous general rate increase cases that rates on iron ore are admittedly depressed and that iron ore received favored treatment in past general rate increase cases? (Tr. 133, 136-138; *Increased Freight Rates*, 1958, 302 I.C.C. 665, 690.) It is with iron ore and its products, hot metal and pig iron, that scrap competes, and not one pound of iron ore moves by truck.

2. Appellants were not afforded a fair hearing. The examiner made it crystal clear during the proceedings that he would uphold the right of the witnesses for the intervening steel mills to refuse to answer questions on the grounds of confidential information (Tr. 243). Surely appellants were not required to uselessly pursue a line of questions forbidden by the examiner which would only serve to delay the proceedings and antagonize the trier of facts. The one objection cited by appellees (Appellees' Motion p. 8) which the examiner did overrule followed testimony in which the witness cautiously answered the question, "For the record, no." (Tr. 303).

Objections to appellants' questions that exceeded the scope of direct examination are not at issue here (Appellees' Motion, p. 8, second sentence, footnote 8). Moreover, appellees mistakenly apply common law rules of proof not applicable in administrative proceedings of this type. *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 44; Rule 1.75, General Rules of Practice, Interstate Com-

merce Commission; *Jersey City* v. *United States*, 54 F.S. 315, 316; *Southern Stevedoring Co.* v. *Voris*, 190 F.2d 275, 277.

Further, in those few instances where witnesses were required to answer over objections, the questions went to matters of general knowledge of each witness and not to details of that witness' own plant. (Appellees' Motion p. 8, footnote 8). Of the five references to the transcript cited in the last sentence of footnote 8 of Appellees' Motion, three pertained to questions propounded to the two witnesses for the railroads who were not associated with any particular railroad, but were employed respectively by the Traffic Executive Association-Eastern Railroads and the Central Territory Railroads Association.

3. If the material, admitted errors of the Commission were in fact typographical, why were these not corrected rather than perpetually memorialized in the official published reports of the Commission? Where the Commission has misread exhibits, its orders have been enjoined. *Pacific Inland Tariff Bureau* v. *United States*, 134 F.S. 210, 213.

4. The decision of the District Court that there was no merit in appellants' contentions that the Commission's findings were without foundation, does not of itself, prevent this Court from further review. "So long as the Congress has deemed it right to subject the orders of the Commission to review by this Court, the duty of analyzing the essential issues of an order cannot be escaped by too easy reliance on the conclusion of a district court or on the indisputable formula that an exercise of discretion by the Commission is not to be displaced by a contrary exercise of judicial discretion." *Dubitante* of Justice Frankfurter in *Radio Corporation of America* v. *United States*, 341 U.S. 412, 423. See also *Florida* v. *United States*, 282 U.S. 194, 215; *The Pennsylvania Railroad Co.* v. *United*

States, 99 F.S. 394, 400, affd. 342 U.S. 890; *Southern Railway Co.* v. *Virginia*, 290 U.S. 190, 195.

II. Intervening Defendants' Motion

1. Intervening defendants refer to the Commission's finding that "some (scrap) rates" are much below the 70 percent level (Intervening Defendants' Motion p. 2). The Commission and the intervening defendants are referring to rates reduced because of water or truck competition and inter-plant rates between steel mills which are either paper rates or not susceptible to use by commercial scrap dealers. Such depressed rates have not been assailed by appellants and are not the subject of this appeal.

2. Appellants alleged that railroads in every territory in the United States except Official Territory had adjusted rates on scrap (Complaint, paragraph XXIV, p. 10, 11). The Commission and intervening defendants improperly compare the level of rates in Official Territory to those in the South and Southwest. Such comparisons are distorted because of the vast difference in conditions existing in the respective territories. For example, the movement of scrap in Official Territory accounts for 75 percent of the scrap shipped in the United States. *Increased Freight Rates*, 1958, 302 I.C.C. 665, 696. Further, the scrap handled by the Eastern railroads is principally heavy loading industrial and dealer-prepared scrap, while most of the scrap shipped in the South and Southwest is so-called country and unprepared scrap having lesser weight per car and shipped for longer mileage.

3. Intervening defendants assert that the assailed rates were previously found lawful by the Commission. This is not true. What the Commission did find in more than forty cases is that 44,800 pound scrap rates were unreasonable insofar as they exceeded 70 percent of 40,000 pound

manufactured iron and steel rates. The intervening defendant railroads admitted that they had opposed this relationship for years, but finally capitulated in its validity and have recently awarded reparations upon application by postal card from shippers (Tr. 70). No doubt this accounts for the few reparations cases, if any, filed since 1955 (Intervening Defendants' Motion p. 2), although more than forty cases had been decided prior to 1955 (J.S. 10-12).

4. Intervening defendants allude to the Commission's finding that transportation conditions and loading characteristics of manufactured iron and steel and scrap differ widely (Intervening Defendants' Motion p. 5). It is incredible that the Commission could reach this conclusion in view of the directly contrary testimony of the defendant railroads' chief witness (Tr. 47), the intervening steel mills' chief witness (J.S. 18), and the findings of the Commission itself in more than forty previous cases (J.S. 10-12).

5. Intervening defendants have mistakenly applied Rule 43(b) of the Federal Rules of Civil Procedure to these proceedings. That the Federal Rules of Civil Procedure do not here apply is so patently clear, further rebuttal is unnecessary. Rule 1, Federal Rules of Civil Procedure; *Interstate Commerce Commission* v. *Baird, supra*. However, since intervening defendants incorrectly state that the basis for the examiner's assailed ruling was "that cross-examination could not go beyond the scope of direct examination" (Intervening Defendants' Motion p. 6), it is necessary to repeat *verbatim* the examiner's mandate on page 243 of the transcript referred to on page 15 of appellants' jurisdictional statement:

> "Exam. Luttrell: He said he thought it was confidential information that he thought he should not reveal. I am ruling that the intervenor has the right to plead that."

CONCLUSION

In the interest of substantial justice and in fairness to 360 appellants it is submitted that refusal to review the instant case on its merits will result in grave and irreparable damage. Succinctly, the following would be the inevitable results:

1. Scrap iron in Official Territory would not be related to iron ore, pig iron or manufactured iron and steel products by reason of the decision of the District Court below. This conclusion destroys thirty-four years of precedent and overrules every previous yardstick decision of the Federal Courts and the Interstate Commerce Commission since the *Newport News* case. Since neither the District Court below nor the Interstate Commerce Commission have ever indicated what scrap iron would be related to, it would appear that the present scrap rates would be an anomaly in the railroad tariffs henceforth and forever.

2. The decision of the District Court affirming the Interstate Commerce Commission would approve subnormal iron ore rates and provide that manufactured pig iron and new steel products should move on cheaper freight rates than scrap iron in Official Territory, although this is not the case in Southern Territory, Southwestern Territory, Mountain Territory, Western Trunk Line Territory, and North and South Pacific Coast Territories. In effect, refusal to review the merits of this case would place a judicial stamp of approval on scrap iron becoming an "orphan" in railroad tariffs with the shippers forced to pay whatever the traffic would bear.

3. Refusal to review the decision of the District Court would affirm a doctrine that eleven integrated steel mills owning their own blast furnaces could move both their raw material and manufactured products at abnormally

low rates subsidized by the abnormally high rates paid by scrap dealers.

4. If the instant case stands affirmed, then 360 appellants become victim to economic sanctions applied by steel mill interveners and railroad defendants having no regard for the continued existence of an industry which has made superlative efforts to maintain the nation's economy and its defense resources during three critical times in this nation's history — 1917-1920, 1941-1946 and 1950-1952.

5. If the District Court and the Interstate Commerce Commission's decisions are affirmed, the present level of railroad rates will exhaust as much as 50 percent of the delivered price of scrap iron at the furnace doors of steel producers. The decision would condone such flagrant practice as that exemplified by the following transcript excerpts from the defendant railroads' chief witness; page 146, lines 8 through 25 and page 152, lines 8 through 19:

> "Q How did you arrive at what those rates were to be on imported iron ore from Baltimore and Philadelphia and Hampton Roads; what yardstick did you use in your rate making?
>
> A. They, of course, were made by the highest order of railroad executives that we have, and they were based on long negotiations with the steel people.
>
> Q You mean the Presidents Conference?
>
> A At times they went up to the Presidents Conference. I was thinking mainly of the Traffic Executives.
>
> Q You mean they didn't go to the Section 5(a) committees, did they?
>
> A Eventually they were approved by the Traffic Executive Association of the Eastern Railroads.
>
> Q After the presidents of the railroads made the decisions, isn't that right?
>
> A The railroads had to agree to something before they submitted it to the committees. They were based upon the economic necessities—"
>
> • • •

"Q In this case the President's Conference decided it for you, didn't they?

A I won't say that. I will say the Traffic Executive Association of the Eastern Railroads decided it for us.

Q They told you what the rates would be?

A They approved the rates.

Q They told you what the rates would be? These rates were not formulated by you for iron ore?

A No, sir. These imports rates.

Q These import rates?

A That is right.

Mr. Gould: No further questions."

6. By the invidious technique of appellees' and intervening defendants' reasoning scrap iron is divorced from the iron and steel category thereby eliminating the odious freight rate comparisons with iron ore, pig iron and new steel. By a false postulate, scrap iron is determined by the Interstate Commerce Commission and the District Court to have no loading characteristics similar to iron ore, pig iron and new steel despite the fact that for thirty-four years the Federal Courts and the Commission have consistently and without exception indexed, compared and related scrap iron to iron and steel commodities.

7. If the motions to affirm are sustained this Court will provide a sweeping precedent that proceedings in the Interstate Commerce Commission may be conducted in a singular form of "star chamber session" whereby the large economic interests in the United States can sweep into court acting in concert with canned testimony, unload that testimony couched in deliberate language to avoid fundamental cross-examination and then depart the hearing chamber protected by a newly-devised protective shield of "confidential information." No shipper large or small nor any group of shippers can cope with forty-nine Class I railroads and the eleven largest steel mills in Eastern Territory acting as an impregnable line of defense in protecting

"favorite cousin" freight rates. This economic alliance has created an unreasonable burden upon an independent industry, while raw materials and manufactured products of one of the nation's largest industries are transported at subnormal rates. The decision of the District Court affirming the Commission nullifies Sections 1 and 3 of the Interstate Commerce Act as far as scrap iron shippers are concerned because there is no possible remedy for their invoking the Congressional intent embodied in these two sections of the Act if the District Court's decision is affirmed.

For the foregoing reasons, it is respectfully submitted that the motions to affirm of the appellees and intervening defendants be overruled.

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DAVID REICHERT
Attorneys for Appellants

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Cincinnati 2, Ohio
November, 1963.

PROOF OF SERVICE

I, Howard Gould, one of the attorneys for the appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also upon the Solicitor General, Department of Justice, Washington 25, D.C., by mailing a copy thereof, properly addressed to said parties, with air mail postage where required and first class postage where permitted, prepaid.

Dated at Cincinnati, Ohio, this 18th day of November, 1963.

Howard Gould